

Appellants note that this latest appeal brief is being filed in response to the examiner's "notification of non-compliant appeal brief" mailed February 9, 2007. In the notification, the examiner found appellant's appeal brief to be non-compliant due to the lack of a "Summary of claimed subject matter" per 37 CFR § 41.37(c)(1)(v) and the lack of a "Grounds of rejection to be reviewed on appeal"

per 37 CFR § 41.37(c)(1)(vi). However, appellant's strenuously represent that appellant's appeal brief filed on October 7, 2006 was in fact compliant. Appellants respectfully point out that CFR § 41.37(c)(1) expressly and clearly relieves appellants who are not represented by a registered practitioner such as the current pro se appellants, from the requirements of CFR § 41.37(c)(1)(v) and (vi) by stating, "... *except that a brief filed by an appellant who is not represented by a registered practitioner need only substantially comply with paragraphs (c)(1)(i) through (c)(1)(iv) and (c)(1)(vii) through (c)(1)(x) of this section*". Appellants further respectfully point out that CFR § 41.37(c)(1) does not selectively apply to a pro se appellant or not based on the appellant's prosecutorial skill or the lack thereof. Nevertheless, in order to expedite prosecution, appellants submit this appeal brief, substantially identical to appellant's appeal brief filed on October 7, 2006 except that appellant's have added a "Summary of claimed subject matter" per 37 CFR § 41.37(c)(1)(v) and a "Grounds of rejection to be reviewed on appeal" per 37 CFR § 41.37(c)(1)(vi).

(c)(1)(i) Real Party in Interest

The real party in interest is Vivian A. Schramm and Michael R. Schramm.

(c)(1)(ii) Related Appeals and Interferences

Appellants are unaware of any pending appeal or interference which affects this appeal.

(c)(1)(iii) Status of Claims

Claims 1-14 and 21-25 are rejected and are pending and on appeal. Claims 15-20 have been cancelled.

(c)(1)(iv) Status of Amendments

The appealed claims have been finally rejected. No amendments have been filed subsequent to the latest final rejection.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 1

The subject matter of claim 1 is a spill resistant container having an inwardly extending open funnel and spill resistantly and removably containing at least one of an edible particulate candy substance, an edible flowable candy substance, and a candy article substance as described in the specification on page 4 lines 14 through 24, and as shown in the drawings in sheets 1 through 5 which depict container 10 having a funnel 36 and containing a lollipop 40 and edible particulate matter 60.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 8

The subject matter of claim 8 is a spill resistant container that inhibits the spillage of free flowing particulate matter having an opening and containing at least one of an edible particulate candy substance, an edible flowable candy substance, and a candy article substance as described in the specification on page 4 lines 14 through 24, and as shown in the drawings in sheets 1 through 5 which depict container 10 having a funnel upper opening 38 and containing a lollipop 40 and edible particulate matter 60.

(c)(1)(v) Summary of Claimed Subject Matter, Claim 21

The subject matter of claim 21 is a spill resistant container having an inwardly extending open funnel and containing an edible particulate candy substance and a candy article substance as described in the specification on page 4 lines 14 through 24, and as shown in the drawings in sheets 1 through 5

which depict container 10 having a funnel 36 and containing a lollipop 40 and edible particulate matter 60.

(c)(1)(vi) Grounds of Rejection to be Reviewed on Appeal

Ground 1: Claims 1 – 14 and 21 – 25 are rejected under 35 USC § 103(a) as being obvious based on Price (3,840,678).

Ground 2: Claims 1 – 14 and 21 – 25 are rejected under 35 USC § 103(a) as being obvious based on Product Alert (3/23/98).

Ground 3: Claims 1 – 14 and 21 – 25 are rejected under obvious type double patenting over claims 1 – 9 of US patent 5,246,046 and claims 1 – 11 of US patent RE36,131 in view of Price (3,840,678).

Ground 4: Claims 1 – 14 and 21 – 25 are rejected under obvious type double patenting over claims 1–29 of US patent 6,386,138 in view of Price (3,840,678).

Ground 5: Claims 1 – 4 and 21 – 25 are rejected under 35 USC § 102(c)/103 in view of Price (3,840,678).

Ground 6: Claims 1 – 4 are rejected under 35 USC § 112 first paragraph as containing new matter.

(c)(1)(vii) Argument 1, Claims 1-14 and 21-25 were erroneously rejected under 35 USC § 103(a) - Obviousness:

The examiner has rejected claims 1 – 14 and 21 – 25 under 35 USC § 103(a) based on Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870). The examiner has also rejected claims 1 – 14 and 21 – 25 under 35 USC § 103(a) based on Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), ('046), in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson

(‘975), Corteggiani et al (FR’917), Pilot Ink (JP’388), and McCaffery (‘164). The appellants respectfully traverse the examiner’s rejection on the basis that the appellant’s invention in the appended claims is substantially different than the cited prior art patents and on the basis of negative teachings by the cited patents. The appellants also respectfully point out that appellant’s application, having a filing date of November 06, 2000, antedates the Candy Warehouse (3/27/03) reference. The appellants therefore respectfully suggest that the Candy Warehouse (3/27/03) reference should not be considered as prior art. The appellants do not dispute that a flowable substance will flow out of a container when such flowable substance is not otherwise prevented from flowing out of a container. Nevertheless, the appellants request that Candy Warehouse (3/27/03) be withdrawn as prior art notwithstanding such properties of flow of such flowable matter.

Substantially Different: The appellants urge that the teachings of Price (‘678), Product Alert (3/23/98), ‘174, ‘046 and ‘131, as well as all of the other cited prior art, are far removed from that of the invention claimed by the appellants. The ‘678 patent is directed towards “fluid food” in combination with a breadstick spoon and a “non-spill cup”. Further, aside from generically citing “fluid food” (i.e. the fluid food into which the non-fluid food is dipped), the only food specifically identified in ‘678 is “hamburgers, sandwiches, and bread sticks”. Such foods would ordinarily be considered “food”, such as that food which is consumed as a meal and to provide nourishment. While food in general and candy in particular both define edible matter, the appellants respectfully suggest that candy, the subject of the appellant’s application, does not define “food” in the general term, and is distinct from and definable over the “hamburgers, sandwiches, and bread sticks” of Price or from the liquid food into which the “hamburgers, sandwiches, and bread sticks” would be dipped (i.e. catsup, mustard, mayonnaise, etc.). The appellants respectfully suggest that an ordinary person would not sit down to a meal of sour candy granules nor would the person consider the same to be “food”. The appellants further respectfully suggest that an ordinary person would not dip “hamburgers, sandwiches, and breadsticks” into candy powder, candy beads, candy liquid, or the like. The appellants therefore respectfully suggest that there would not have been the motivation to combine the references as required by the examiner’s assertion of obviousness. Furthermore, even if candy were to be considered a food, which the appellants do not consider to be the case, ‘678 did not contemplate or teach such sub-category of food (i.e. candy) in combination with the “non-spill” cup.

The appellants note that '046 and '131 were directed toward resisting the spillage of liquid bubble solution whereas appellant's current application is directed towards resisting the spillage of candy powder or candy beads or the like while having an open container access so as to be able to coat a lollipop type confection with the candy powder or candy beads. The appellants have not and do not claim to be the inventors of a mere lollipop, a mere container with a funnel, or a mere (spillable) container of candy power in combination with a lollipop. The appellants respectfully point out that the product alert and like references, functionally similar to Coleman ('884), Hoeting et al ('870), Impact Confections' "Lollipop Paintshop" and other references that the appellants disclosed in their November 6, 2000 information disclosure statement, merely confirm the appellant's assertion of the long felt need for a solution to the problem of spillage of flowable candy, especially flowable candy contained in a container that is combined with a lollipop. The successful creation of a product that allows the user to readily coat a lollipop type confection with candy powder or the like without having the burden of opening and closing a lid or performing some other cumbersome process to provide for spill resistance of the flowable candy contained therein, creates a heretofore unknown and non-obvious product.

It is also respectfully pointed out that the difference between the prior patents and the current application is greater than merely a recitation that the container now contains edible matter. The examiner states that, "the differences are substantially in the content of the container". The appellants agree that there are substantial differences in the contents of the current inventive container and the containers of the previous inventions. The appellants urge that such difference in container contents contributes to the patentability of the subject invention. While the examiner may not perceive the container contents as contributing to patentability and non-obviousness, clearly, this is not a position universally held by the office. To confirm this, one need look no further than the appellant's own cited prior invention. US patent application 09/287,798, which is directed to a spill proof Easter egg coloring container (a license to which is currently being negotiated, and product based on which is anticipated to be commercially available by Spring 2008) and which during the prosecution of the subject application has matured into US patent 6,386,138, was allowed in part due to the unique matter contained within the container (e.g. an edible egg). See for instance independent claims 10 and 20 of US patent 6,386,138. As additional confirmation, attention is drawn to other art cited in the

application. For instance, US 1,254,714 for a spill resistant paint container with a removable brush issued to McCombs, US 3,781,164 for a spill resistant candle container issued to McCaffery, US 3,840,678 for a spill resistant condiment container with a removable breadstick issued to Price, US 5,105,975 for a spill resistant drink container with a removable straw issued to Patterson, US 5,246,046 for a spill resistant bubble solution container with a removable wand issued to Schramm, US 5,758,797 for a spill resistant fingerprint powder container issued to Martindale, US 6,386,138 for a spill resistant Easter egg container with a removable utensil issued to Schramm, and recently allowed Schramm US reissue application 09/867,320 (a reissue of US 5,908,057) for a spill resistant bubble machine spill resistantly containing a flowable liquid all differ from one another principally due to the matter spill resistantly contained within their containers. Should the examiner's same standard of obviousness have been applied to the cited art, McCaffery would not have issued due to McCombs, Price would not have issued due to McCaffery, Patterson would not have issued due to Price, Schramm ('046) would not have issued due to Patterson, Martindale would not have issued due to Schramm ('046), Schramm ('138) would not have issued due to Martindale, and Schramm ('320) would not have been allowed due to Schramm. Furthermore, none of McCombs, McCaffery, Price, Patterson, Schramm ('046), Martindale, Schramm ('138), and Schramm ('320) would have issued or allowed due to US 676,924 for a spill resistant spittle container (i.e. spittoon) issued to Steiger. Nevertheless, as can be seen from the cited art, the patents and application were allowed and were considered to define over their respective predecessors due at least in part to the matter which they respectively spill resistantly contained.

Additionally, the appellants note that US patent 6,530,815 to Bro et. al. covering a spill resistant bubble solution container having a impending funnel and a removable bubble wand and US patents 6,595,822, 6,638,131, and 6,857,928, to Thai, covering spill resistant bubble solution containers having impending non-cylindrical funnels and removable bubble wands, were all examined in light of Schramm patent RE36,131 covering a spill resistant bubble solution container having a impending non-cylindrical funnel and a removable bubble wand, and were allowed in spite of RE36,131. Appellants respectfully suggest that the subject matter in the above noted art is far closer to RE36,131 than is appellant's current application directed to containers of spill resistant flowable candy with removable lollipops, and yet the above noted art was considered non-obvious over RE36,131.

Inasmuch as the above noted art was considered nonobvious over RE36,131, the appellants respectfully suggest that the current application is even more nonobvious over the art of record.

Negative Teaching: The appellants respectfully disagree with the examiner's obviousness rejection and urge that the Coleman and Hoeting art provide negative teachings. The appellants respectfully suggest that the negative teachings needn't be limited to what is claimed but may be found elsewhere in the specification. As noted in the appellants' previous office action responses, both Coleman and Hoeting recognized the problem of spillage of candy particulate and both attempt to address the problem in their respective inventions. Further, the same can be said for the veritable plethora of containers of flowable candy in combination with lollipops - including those shown in the Product Alert references - that are available on the market. Consequently, many manufacturers of such containers of flowable candy include cautionary language on their product packaging to guard against spills. It is also acknowledged that Coleman does provide a candy particulate container having a degree of spill resistivity. However, in as much as Coleman stores the lollipop product outside of the particulate containing compartment of the container, the container must be opened to access the particulate with the lollipop. By opening the Coleman container, the container is then of course rendered highly spillable much like any open-mouthed conventional container.

In an apparent effort to overcome this loss of spill resistivity, Hoeting redesigned his disclosed invention to place both the lollipop product and the particulate candy within the same "spill resistant" closed container. And as with Coleman, so long as the Hoeting container remains closed, the Hoeting container is spill resistant. And as with Coleman, in order to use the Hoeting container, the Hoeting container must be opened, rendering Hoeting highly spillable. However, in spite of having access to Hunter and Martindale, not only have Coleman and Hoeting put forth edible particulate containers lacking the very funnel that could have solved the recognized problem, Hoeting introduced a new problem. The Hoeting product is analogous to an unassuming person holding a conventional cup of coffee and wearing a wristwatch. When the person is asked what time it is, the person responds by turning his wrist to observe the face of his watch, only to spill his coffee from his cup. Likewise, because Hoeting placed the lollipop inside of the container with the candy particulate, it is a natural tendency for a user of the Hoeting product to spill the candy particulate when rotating the Hoeting container into a position to access the lollipop. Coleman and Hoeting, in spite of Hunter, Martindale,

and all other prior art, have taught inventions that do not solve their own recognized problem of spill resistance of accessible particulate candy. The appellants suggest that if their invention was obvious to one having ordinary skill in the art, then inventors such as Coleman and Hoeting who had access to art having containers with funnels, would have solved the problem as the applicants have done. Instead, in spite of the long felt and clearly recognized need, other inventors such as Coleman and Hoeting have not invented the appellants' invention and Coleman and Hoeting have negatively taught spill resistance of particulate candy with conventional non-funneled containers that are in fact highly spillable.

In conclusion, the appellants respectfully suggest that the spill resistant candy container is no more obvious in light of powder containers having funnels and candy powder containers than was the spill resistant bubble solution container in light of bubble solution containers with a version of a funnel and spill resistant liquid containers. Given the substantially different invention, and the negative teaching, it is urged that an "obvious" rejection is not proper and it is respectfully requested that the examiner withdraw the rejection.

(c)(1)(vii) Argument 2, Claims 1-14 and 21-25 were erroneously rejected under Obvious Type Double Patenting:

The examiner has rejected claims 1 – 14 and 21 – 25 under obvious type double patenting over claims 1 – 9 of US patent 5,246,046 and claims 1 – 11 of US patent RE36,131 in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-K, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870). The appellants respectfully traverse the examiner's rejection on the basis that the appellant's invention in the appended claims is substantially different than the claims of the cited prior patents of the appellant and on the basis of negative teaching. The appellants also again respectfully request that Candy Warehouse (3/27/03) be withdrawn as prior art as appellant's disclosure antedates the Candy Warehouse (3/27/03) reference.

Substantially Different: The appellants urge that the teachings of '046 and '131 are far removed from that of the claims of the current application. The appellants note that '046 and '131 were directed toward resisting the spillage of liquid bubble solution whereas appellant's current application is directed towards resisting the spillage of candy powder, candy beads, or other flowable candy substance while having an open container access so as to be able to coat a lollipop type confection with the candy substance. The successful creation of a product that allows the user to readily coat a lollipop type confection with candy powder or the like without having the burden of opening and closing a lid or other perform some other cumbersome process creates a heretofore unknown and nonobvious product. Thus the difference between the prior patents and the current application is greater than merely a recitation that the container now contains edible matter.

Negative Teaching: As noted in the appellants office action responses, both Coleman and Hoeting recognized the problem of spillage of candy particulate and both attempt to address the problem in their respective inventions. It is also acknowledged that Coleman does provide a candy particulate container having a degree of spill resistivity. However, in as much as Coleman stores the lollipop product outside of the particulate containing compartment of the container, the container must be opened to access the particulate with the lollipop. By opening the Coleman container, the container is then of course, rendered highly spillable much like any open-mouthed conventional container.

In an apparent effort to overcome this loss of spill resistivity, Hoeting redesigned his disclosed invention to place both the lollipop product and the particulate candy within the same "spill resistant" closed container. And as with Coleman, so long as the Hoeting container remains closed, the Hoeting container is spill resistant. And as with Coleman, in order to use the Hoeting container, the Hoeting container must be opened, rendering Hoeting highly spillable. However, in spite of having access to Hunter and Martindale, not only have Coleman and Hoeting put forth edible particulate containers lacking the very funnel that could have solved the recognized problem, Hoeting introduced a new problem. The Hoeting product is analogous to an unassuming person holding a conventional cup of coffee and wearing a wristwatch. When the person is asked "what time is it?" the person responds by turning his wrist to observe the face of his watch, only to spill his coffee from his cup. Likewise, because Hoeting placed the lollipop inside of the container with the candy particulate, it is a natural tendency for a user of the Hoeting product to spill the candy particulate when rotating the Hoeting

container into a position to access the lollipop. In summary, Coleman and Hoeting, in spite of Hunter, Martindale, and all other prior art, have taught inventions that do not solve their own recognized problem of spill resistance of accessible particulate candy. The appellants suggest that if their invention was obvious to one having ordinary skill in the art, then inventors such as Coleman and Hoeting who had access to art having containers with funnels, would have solved the problem as appellants have done. Instead, in spite of the long felt need, other inventors such as Coleman and Hoeting have not invented the applicant's invention and Coleman and Hoeting have negatively taught spill resistance of particulate candy with convention non-funnelled containers that are in fact highly spillable.

In conclusion, the appellants suggest that the spill resistant candy container is no more obvious in light of powder containers having funnels and candy powder containers than appellant's spill resistant bubble solution container was in light of bubble solution containers with a version of a funnel and spill resistant liquid containers (e.g. appellant's '046 and '131 patents were allowed over such noted prior art). Given the substantially different invention and the negative teaching, it is urged that a double patenting rejection is not proper and it is requested that the examiner be reversed.

(c)(1)(vii) Argument 3, Claims 1-14 and 21-25 were erroneously rejected under Obvious Type Double Patenting:

The examiner has rejected claims 1 – 14 and 21 – 25 under obvious type double patenting over claims 1–29 of US patent 6,386,138 in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-K, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870). Appellants respectfully traverse the examiner's rejection on the basis that the appellant's invention in the appended claims is substantially different than the claims of the cited prior patent of the appellant and on the basis of negative teaching. The appellants also again respectfully request that Candy Warehouse (3/27/03) be withdrawn as prior art as appellant's disclosure antedates the Candy Warehouse (3/27/03) reference.

Substantially Different: The appellants urge that the teaching of '138 is far removed from that of the amended claims of the current application. The appellants note that '138 was directed toward resisting the spillage of a liquid dye while coloring an Easter egg whereas the appellants current application is directed towards resisting the spillage of candy powder, candy beads, or other flowable candy substance while having an open container access so as to be able to coat a lollipop type confection with the candy substance. The successful creation of a product that allows the user to readily coat a lollipop type confection with candy powder or the like without having the burden of opening and closing a lid or other performing some other cumbersome process creates a heretofore unknown and nonobvious product. Thus the difference between the prior patents and the current application is greater than merely a recitation that the container now contains a different work piece.

Negative Teaching: As noted in the appellants office action responses, both Coleman and Hoeting recognized the problem of spillage of candy particulate and both attempt to address the problem in their respective inventions. It is also acknowledged that Coleman does provide a candy particulate container having a degree of spill resistivity. However, in as much as Coleman stores the lollipop product outside of the particulate containing compartment of the container, the container must be opened to access the particulate with the lollipop. By opening the Coleman container, the container is then of course, rendered highly spillable much like any open-mouthed conventional container.

In an apparent effort to overcome this loss of spill resistivity, Hoeting redesigned his disclosed invention to place both the lollipop product and the particulate candy within the same "spill resistant" closed container. And as with Coleman, so long as the Hoeting container remains closed, the Hoeting container is spill resistant. And as with Coleman, in order to use the Hoeting container, the Hoeting container must be opened, rendering Hoeting highly spillable. However, in spite of having access to Hunter and Martindale, not only have Coleman and Hoeting put forth edible particulate containers lacking the very funnel that could have solved the recognized problem, Hoeting introduced a new problem. The Hoeting product is analogous to an unassuming person holding a conventional cup of coffee and wearing a wristwatch. When the person is asked "what time is it?" the person responds by turning his wrist to observe the face of his watch, only to spill his coffee from his cup. Likewise, because Hoeting placed the lollipop inside of the container with the candy particulate, it is a natural tendency for a user of the Hoeting product to spill the candy particulate when rotating the Hoeting

container into a position to access the lollipop. In summary, Coleman and Hoeting, in spite of Hunter, Martindale, and all other prior art, have taught inventions that do not solve their own recognized problem of spill resistance of accessible particulate candy. Appellants suggest that if their invention was obvious to one having ordinary skill in the art, then inventors such as Coleman and Hoeting who had access to art having containers with funnels, would have solved the problem as appellants have done. Instead, in spite of the long felt need, other inventors such as Coleman and Hoeting have not invented the applicant's invention and Coleman and Hoeting have negatively taught spill resistance of particulate candy with convention non-funneled containers that are in fact highly spillable.

In conclusion, the appellants suggest that the spill resistant candy container is no more obvious in light of powder containers having funnels and candy powder containers than the appellant's spill resistant bubble solution container was in light of bubble solution containers with a version of a funnel and spill resistant liquid containers (e.g. appellant's '046 and '131 patents were allowed over such noted prior art). Given the substantially different invention and the negative teaching, it is urged that a double patenting rejection is not proper and it is requested that the examiner be reversed.

(c)(1)(vii) Argument 4, Claims 1-4 and 21-25 were erroneously rejected under 35 USC 102(c)/103:

The examiner has rejected claims 1 – 4 and 21 – 25 under 35 USC § 102(e)/103 in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-K, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870) or Product Alert (3/23/98) as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-K, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870), in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164). The appellants respectfully traverse the examiner's rejection

essentially for the reasons given above – i.e. on the basis that the appellant’s invention in the appended claims is substantially different than the cited prior patents and on the basis of negative teachings by the cited patents. The appellants also again respectfully request that Candy Warehouse (3/27/03) be withdrawn as prior art as appellant’s disclosure antedates the Candy Warehouse (3/27/03) reference.

In all of the claims of the current application, the appellants have limited their claims to having candy containers. The majority of the cited prior art are far removed from the appellants current invention and do not remotely address candy or candy containers. Those prior patents that do deal with candy containers have been shown to teach contrary to appellants invention in spite of the available prior art and have been shown to be lacking a substantive spill resistant function (when the container is opened). Given the substantially different invention and the negative teaching, it is urged that the 35 USC § 102(e)/103 rejection is not proper and it is requested that the examiner be reversed.

(c)(1)(vii) Argument 5, Claims 1-14 were erroneously rejected as containing new matter:

The appellants respectfully traverse the Examiners argument that appellant’s application contains new matter. The examiner argues that the use of the phrase “edible flowable candy substance” constitutes new matter and further that “the sole disclosure of candy material in the container is the lollipop or the solid particulate material”. The appellants respectfully point out the original specification specifically stated, “Edible particulate matter 60 defines a free flowing edible particulate matter such as flavored candy powder, candy beads, or any other particulate type edible material” (see page 6, first paragraph, last sentence). The appellants further respectfully point out such description, which describes a substance that is edible and exhibits the property of flow, clearly provides support for the claimed “edible flowable candy substance”.

Additionally, the examiner argues that, “The phrase edible “flowable” candy substance is readable on liquids, which are not disclosed as originally filed.” The appellants respectfully urge that to the extent that support for claim language is found in the originally filed specification (e.g. candy powder in support of “edible flowable candy substance”), that the claim language may also read on other things (e.g. liquids) is of no consequence and does not constitute new matter.

The following is a quotation of 35 USC § 112, first paragraph:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The appellants respectfully maintain that inasmuch as a “free flowing edible particulate matter such as flavored candy powder” was disclosed in the original specification, with respect to an “edible flowable candy substance”, the written description requirement of 35 USC § 112, first paragraph is satisfied. Thus even though an “edible flowable candy substance” may read on a liquid, such reading on a liquid does not negate the satisfaction of 35 USC § 112, first paragraph’s written description requirement. If on the other hand, the appellants had claimed matter that was not supported in the original specification, such as for instance by “adding specific percentages or compounds after a broader original disclosure” or by “the omission of a step from a method”, the appellants would agree that new matter was added.

Thus by reading 35 USC § 112, first paragraph, the appellants urge that the test to determine new matter is not “Can the claims read on matter not disclosed in the specification?” as the examiner implies but rather “Are the claims supported by the original specification?”. The appellants argue that if the appellant’s original specification can support the phrase in question, then the claimed subject matter cannot be construed to be new matter. The appellants offer the following comparison as an example in support of their position. If for instance an applicant disclosed an automotive vehicle having red colored tires, ignoring any issues of novelty and obviousness, etc., the appellants argue that the applicant should be entitled to claim “a vehicle having non-black colored tires”. Conversely, by the reasoning established in the examiner’s rejection, the applicant would not be able to make the noted claim as “a vehicle having non-black colored tires” would read on a vehicle having blue (or other non-black) colored tires when only red colored tires were disclosed. Again, the appellants disagree with the latter argument. In as much as it is established that the original specification supports the claimed subject matter, it is urged that a “new matter” rejection is not proper and it is requested that the rejection be reversed.

(c)(1)(viii) Claims appendix

The following are the claims involved with this appeal.

1. A container for inhibiting the spillage of contents of said container, wherein said container defines an inner cavity and a funnel extending into said inner cavity to provide communication between said inner cavity and the exterior of said container, and wherein said container removably contains at least one substance of the following group of substances comprising an edible particulate candy substance, an edible flowable candy substance, and a candy article substance.
2. The container of claim 1 wherein said edible particulate substance further defines at least one substance of the following group of substances comprising a candy powder substance and a candy bead substance, and wherein said candy article substance further defines a substance of one of the following group of substances comprising a discreet substantially spherical candy substance and a lollipop substance.
3. The container of claim 1 wherein said container inhibits the spillage of said substance when said container is oriented in any position.
4. The container of claim 3 wherein said container includes a lollipop within said container and wherein said lollipop is removable from said container by passing said lollipop through said funnel.
5. The container of claim 2 wherein said lollipop defines a lollipop having a handle and wherein said handle includes a pliable holder mounted to said handle and wherein said holder is sealingly engagable to said container.
6. The container of claim 1 wherein said funnel includes an inner opening and wherein said inner opening is located near the center of said container.
7. The container of claim 1 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.

8. A container for inhibiting the spillage of contents of said container, wherein said container defines an inner cavity and an open opening in a wall of said container to provide communication between said inner cavity and the exterior of said container and wherein said container inhibits the spillage of free flowing particulate matter when said container contains free flowing particulate matter and is oriented in any position and wherein said container contains at least one substance of the following group of substances comprising an edible particulate candy substance, an edible flowable candy substance, and a candy article substance.
9. The container of claim 8 wherein said edible particulate substance further defines at least one substance of the following group of substances comprising a candy powder substance and a candy bead substance, and wherein said candy article substance further defines a substance of one of the following group of substances comprising a discreet substantially spherical candy substance and a lollipop substance.
10. The container of claim 8 wherein said open opening defines an open funnel.
11. The container of claim 10 wherein said lollipop is removable from said container by passing said lollipop through said funnel.
12. The container of claim 9 wherein said lollipop substance defines a lollipop having a handle and wherein said handle includes a pliable holder mounted to said handle and wherein said holder is sealingly engagable to said container.
13. The container of claim 10 wherein said funnel includes an inner opening and wherein said inner opening is located near the center of said container.
14. The container of claim 8 wherein at least a portion of said container is substantially transparent so as to reveal the contents of said container.
21. A container for inhibiting the spillage of contents of said container, wherein said container defines an inner cavity and a funnel extending into said inner cavity to provide communication between said inner cavity and the exterior of said container, and

wherein said container contains an edible particulate candy substance and wherein said container removably contains a candy article.

22. The container of claim 21 wherein said particulate candy substance further defines a substance of one of the following group of substances comprising a candy granular substance, a candy powder substance, and a candy bead substance.
23. The container of claim 21 wherein said container inhibits the spillage of said substance when said container is oriented in any position.
24. The container of claim 21 wherein said funnel includes an inner opening and wherein said inner opening is located near the center of said container.
25. The container of claim 21 wherein said candy article further defines a lollipop having an edible candy portion and a handle portion.

(c)(1)(ix) Evidence appendix

Appellants have no evidence to present.

(c)(1)(x) Related proceedings appendix

Appellants are unaware of any proceedings to present.

Conclusion

In view of the comments above, it is submitted that the Examiner erred in rejecting the claims on appeal. The appellants therefore respectfully request that this Honorable Board reverse the Examiner's rejection of the claims. If the Board has any questions or comments which may be resolved over the telephone, the board is requested to call Michael R. Schramm at 801-625-9268 (wk) or at 801-710-7793 (cell).

DATE: March 3, 2007

Respectfully submitted,



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